China Communications Construction Co (M) Sdn Bhd v HRA Teguh Sdn Bhd & Ors

HIGH COURT (SHAH ALAM) — CIVIL SUIT NO BA-22C-37–10 OF 2022
SUMATHI MURUGIAH JC
4 OCTOBER 2023

Civil Procedure — Injunction — Interim injunction — Application by subcontractor for interim injunction to restrain payment of monies by employer to main contractor in relation to construction project — Whether there was bona fide serious issue to be tried — Where justice of case lies — Whether damages adequate remedy — Rules of Court 2012 O 29 r 1(1) & (2)

The second defendant had appointed the first defendant as the main contractor for a project known as the DASH Highway project ('the project'). The first defendant then appointed the plaintiff as its subcontractor in relation to the said project. There was a failure on the part of the first defendant to pay the plaintiff the relevant payment under interim payment certificate ('IPC') No 44 which led to the execution of: (a) a settlement agreement dated 12 August 2021 ('the SA') between the first defendant and the plaintiff; and (b) an individual personal guarantee dated 17 September 2021 by the third defendant. Despite the execution of the SA, the first defendant still failed to pay the relevant payment under IPC NO 44. To further compound the matter, the first defendant failed to pay 96% of IPC No 96 to the plaintiff and further failed to release the retention sum to the plaintiff. As the defendants failed to respond to the plaintiff's letter of demand in relation to the outstanding sums, the plaintiff filed the present action against the defendants. The plaintiff had also filed encl 4 pursuant to O 29 r 1(1) and (2) of the Rules of Court 2012 for the following orders, inter alia: (i) an interim injunction to restrain the first defendant from receiving 96% of the payment under IPC No 64 onwards and the full retention sum or any part thereof ('the said payment') from the second defendant pending the disposal of the plaintiff's claim against the defendants in this suit; (ii) alternatively, if the first defendant had received the said payment, an order that the monies received to be deposited into an interest-bearing stakeholder's account until the disposal of this suit; and (iii) an interim injunction to restrain the second defendant from making the said payment to the first defendant pending disposal of the plaintiff's claim against the defendants in this suit. In opposition, the first defendant argued that the plaintiff had failed to carry out its obligations under the subcontract and that the first defendant had overpaid the plaintiff for the works done and as such, the SA was no longer applicable. The issues to be determined in the present case were: (A) whether there was a bona fide serious issue to be tried; (B) where the

justice of the case lies; and (C) when damages were not an adequate remedy. A

Held, dismissing encl 4 with costs of RM5,000 to the first defendant, RM3,000 to the second defendant, and RM1,000 to the third defendant subject to allocator: B

(1) Whether there was a bona fide serious issue to be tried went back to the reason as to why this application was made by the plaintiff. The plaintiff's claims were based on the alleged breach of the SA and the non-payment for the works done based on the subcontract. Though it was the first defendant's rebuttal that the plaintiff did not come with clean hands as it had failed to carry out its obligations under the subcontract and that the first defendant had overpaid the plaintiff and as such the SA was no longer applicable, all these allegations were by way of a sworn affidavit only. As this was an interlocutory application for an interim injunction, the merits of the case in its entirety could not be deliberated merely by way of affidavits filed by the parties. There being so many questions arising from these affidavits where answers needed to be given, the deponents of these affidavits had to be subjected to cross-examination. Further evidence also had to be adduced in court in order to substantiate the allegations made by all parties. The court therefore had no doubt that the plaintiff had a bona fide serious issue to be tried on this case (see paras 24–26). C D E

(2) The relief sought in the present action was purely monetary, as such, the court could not agree with the plaintiff's argument that if the interim injunction was not granted, the plaintiff would suffer irreparable damages. On the contrary, the court found that if the court allowed this application, the defendants would suffer greater injustice. This was because, allegedly there were still works at the project which were failed to be completed by the first defendant or the plaintiff, and under the main contract, the second defendant had contractual rights which it could exercise including but not limited to deducting all costs, expenses and losses in completing or rectifying the works from any moneys due or to become due. Therefore, the court found that the justice of the case tilting towards not granting the interim injunction (see paras 27–28). F G H

(3) As to the plaintiff's undertaking to pay damages to the defendants should this application fail, this was no longer a factor to be considered by the court as the court had already decided not to allow this application for other obvious reasons. Be that as it may, it had been highlighted to the court that although the undertaking was given, the plaintiff failed to provide any evidence to the court in relation to its financial capabilities to support such an undertaking (see para 29). I

[Bahasa Malaysia summary

Defendan kedua telah melantik defendan pertama sebagai kontraktor utama bagi projek yang dikenali sebagai projek Lebuhraya DASH ('projek tersebut'). Defendan pertama kemudiannya melantik plaintif sebagai subkontraktornya berhubung dengan projek tersebut. Terdapat kegagalan di pihak defendan pertama untuk membayar plaintif bayaran yang berkaitan di bawah sijil pembayaran interim ('IPC') No 44 yang membawa kepada pelaksanaan: (a) perjanjian penyelesaian bertarikh 12 Ogos 2021 ('SA tersebut') antara defendan pertama dan plaintif; dan (b) jaminan peribadi individu bertarikh 17 September 2021 oleh defendan ketiga. Walaupun SA tersebut telah dilaksanakan, defendan pertama masih gagal membayar bayaran berkaitan di bawah IPC No 44. Untuk memburukkan lagi keadaan, defendan pertama gagal membayar 96% daripada IPC No 96 kepada plaintif dan seterusnya gagal melepaskan jumlah penahanan kepada plaintif. Oleh kerana defendan-defendan gagal menjawab surat tuntutan plaintif berhubung dengan jumlah tertunggak tersebut, plaintif memfailkan tindakan semasa terhadap defendan-defendan. Plaintif juga telah memfailkan lampiran 4 menurut A 29 k 1(1) dan (2) Kaedah-Kaedah Mahkamah 2012 untuk perintah-perintah berikut, antara lain: (i) injunksi interim untuk menghalang defendan pertama daripada menerima 96% pembayaran di bawah IPC No 64 dan seterusnya dan jumlah penahanan penuh atau mana-mana bahagian daripadanya ('bayaran tersebut') daripada defendan kedua sementara menunggu pelupusan tuntutan plaintif terhadap defendan-defendan dalam saman ini; (ii) sebagai alternatif, jika defendan pertama telah menerima bayaran tersebut, suatu perintah bahawa wang yang diterima hendaklah didepositkan ke dalam akaun pemegang kepentingan yang mempunyai faedah sehingga saman ini dilupuskan; dan (iii) injunksi interim untuk menghalang defendan kedua daripada membuat bayaran tersebut kepada defendan pertama sementara menunggu pelupusan tuntutan plaintif terhadap defendan-defendan dalam saman ini. Dalam membangkang, defendan pertama berhujah bahawa plaintif telah gagal melaksanakan tanggungjawabnya di bawah subkontrak dan defendan pertama telah membuat bayaran lebih kepada plaintif untuk kerja yang dilakukan dan oleh itu, SA tersebut tidak lagi terpakai. Isu-isu yang perlu ditentukan dalam kes ini ialah: (A) sama ada terdapat isu serius yang bona fide untuk dibicarakan; (B) di mana keadilan kes terletak; dan (C) bila ganti rugi adalah bukan remedi yang mencukupi.

Diputuskan, menolak lampiran 4 dengan kos sebanyak RM5,000 kepada defendan pertama, RM3,000 kepada defendan kedua, dan RM1,000 kepada defendan ketiga tertakluk kepada alokator:

(1) Sama ada terdapat isu serius yang bona fide untuk dibicarakan kembali kepada sebab mengapa permohonan ini dibuat oleh plaintif. Tuntutan plaintif adalah berdasarkan dakwaan pelanggaran SA tersebut dan kegagalan untuk membuat bayaran bagi kerja yang dilakukan

berdasarkan subkontrak. Walaupun ia adalah sanggahan defendan pertama bahawa plaintif tidak datang dengan tangan yang bersih kerana ia telah gagal untuk melaksanakan tanggungjawabnya di bawah subkontrak dan bahawa defendan pertama telah terlebih membuat bayaran kepada plaintif dan oleh itu SA tersebut tidak lagi terpakai, semua dakwaan ini adalah melalui afidavit bersumpah sahaja. Oleh kerana ini adalah permohonan interlokutori untuk injunksi interim, merit kes secara keseluruhannya tidak boleh dibincangkan hanya melalui afidavit yang difailkan oleh pihak-pihak. Memandangkan terdapat begitu banyak persoalan yang timbul daripada afidavit ini di mana jawapan perlu diberikan, deponen-deponen afidavit ini perlu tertakluk kepada pemeriksaan balas. Keterangan lanjut juga perlu dikemukakan di mahkamah bagi membuktikan dakwaan yang dibuat oleh semua pihak. Oleh itu mahkamah tidak mempunyai keraguan bahawa plaintif mempunyai isu serius yang bona fide untuk dibicarakan dalam kes ini (lihat perenggan 24–26).

(2) Relief yang dipohon dalam tindakan semasa adalah semata-mata kewangan, oleh itu, mahkamah tidak boleh bersetuju dengan hujah plaintif bahawa jika injunksi interim tidak diberikan, plaintif akan mengalami kerugian yang tidak boleh diperbaiki. Sebaliknya, mahkamah mendapati bahawa jika mahkamah membenarkan permohonan ini, defendan-defendan akan mengalami ketidakadilan yang lebih besar. Ini kerana, kononnya masih terdapat kerja-kerja dalam projek tersebut yang gagal disiapkan oleh defendan pertama atau plaintif, dan di bawah kontrak utama, defendan kedua mempunyai hak kontrak yang boleh dilaksanakan termasuk tetapi tidak terhad kepada menolak semua kos, perbelanjaan dan kerugian dalam menyiapkan atau membetulkan kerja-kerja tersebut daripada apa-apa wang yang terhutang atau yang akan menjadi terhutang. Oleh itu, mahkamah mendapati bahawa keadilan kes condong ke arah tidak memberikan injunksi interim (lihat perenggan 27–28).

(3) Mengenai aku janji plaintif untuk membayar ganti rugi kepada defendan-defendan sekiranya permohonan ini gagal, ini bukan lagi faktor yang perlu dipertimbangkan oleh mahkamah kerana mahkamah telah pun memutuskan untuk tidak membenarkan permohonan ini atas sebab-sebab lain yang jelas. Walau apa pun, ia telah diketengahkan kepada mahkamah bahawa walaupun akujanji telah diberikan, plaintif gagal memberikan apa-apa keterangan kepada mahkamah berhubung dengan keupayaan kewangannya untuk menyokong akujanji tersebut (lihat perenggan 29).]

Cases referred to

American Cyanamid Co v Ethicon Ltd [1975] AC 396, HL (refd)
Jaya Sudhir a/l Jayaram v Nautical Supreme Sdn Bhd & Ors [2019] 5 MLJ

A 1; [2019] 7 CLJ 395, FC (refd)
Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors [1995] 1 MLJ 193, CA (refd)
Lian Keow Sdn Bhd & Anor v Overseas Credit Finance (M) Bhd & Ors [1982] 2 MLJ 162; [1982] CLJ Rep 182, FC (refd)

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Legislation referred to

Rules of Court 2012 O 29 rr 1(1), (2)

Ng Sim Hong (Edwin Lim & Suren) for the plaintiff.
C *Sanjay Mohan (with Mak Kit Teng) (Sanjaymohan) for the first defendant.*
Andrew Heng Yeng Hoe (with Atiqah Yasmin Sedek and Nurul Azureen Ahsin) (Zain Megat & Murad) for the second defendant.
Nadeem Rafiq (Thangaraj & Assoc) for the third defendant.

D **Sumathi Murugiah JC:**

INTRODUCTION

E **[1]** This was an application made initially by way of an ex parte application ('encl 4') filed by the plaintiff through a certificate of urgency for an interim injunction pursuant to O 29 r 1(1) and (2) of the Rules of Court 2012 ('the ROC 2012') for which an order was granted allowing prayer (i) and (iii) but disallowing prayer (ii) (prayers as mentioned hereinbelow under the heading of
F grounds of application) pending an inter partes hearing of the same. Subsequently, pending the disposal of encl 4, the ex parte order was converted to an ad interim injunction on the same terms by this court.

[2] On 9 August 2023, upon considering parties' (plaintiff, first defendant
G and second defendant) affidavits and submissions filed in relation to encl 4 application, I dismissed the interim injunction sought by the plaintiff.

BRIEF BACKGROUND

H **[3]** The first defendant is the main contractor appointed by the second defendant being the employer to carry out the works under the project known as the DASH Highway project ('the project'). By way of a letter of award dated 13 September 2016, the first defendant appointed the plaintiff as its and total sub the entire works under the project for a contract sum of RM358m.

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[4] Commencing from interim payment certificates ('IPC') Nos 13 to 31, the first defendant agreed for the second defendant to make direct payments to the plaintiff on a portion of 90% to the plaintiff and the balance 10% of each IPC to the first defendant. However, from IPC Nos 32 to 43, the percentage

increased to 96% to the plaintiff and 4% to the first defendant. This increase in percentage to the plaintiff was to reduce the outstanding debt owing to the plaintiff by the first defendant.

[5] For IPC 44, the plaintiff received a sum of RM3,157,248 being 96% of the IPC amount and did not receive the sum of RM5,196,863.75 for IPC No 44A from the first defendant although the second defendant had released the entire sum under these two IPCs to the first defendant based on the first defendant's request.

[6] Due to outstanding payments to the plaintiff by the first defendant for IPC No 44A and the subsequent IPC Nos 52 to 56, the plaintiff issued a notice to suspend the works at the project commencing three days from 7 May 2021. As consequence to that notice, both the plaintiff and the first defendant had entered into a settlement agreement dated 12 August 2021 ('the said settlement agreement') wherein a total outstanding sum of RM9,501,850.78 was agreed to be paid by the first defendant in accordance to the terms and conditions of the said settlement agreement. The plaintiff then resumed works at the project.

[7] The total outstanding sum of RM9,501,850.78 was to be paid by the first defendant to the plaintiff and the third defendant had executed an individual personal guarantee dated 17 September 2021 to pay the plaintiff the said total outstanding sum. Apart from the total outstanding sum being owed to the plaintiff, the first defendant had also assigned the full retention sum of RM19,275,000 ('the full retention sum') to the plaintiff in the said settlement agreement and this sum is to be released upon the issuance of the certificate of practical completion ('CPC') to the plaintiff.

[8] Subsequent to the said settle agreement, payments were not made accordingly and a further non-payment of 96% of IPC No 64 was also not made to the plaintiff. In addition to the non-payment of the sum owed to the plaintiff, upon the issuance of CPC on 28 September 2022, the full retention sum was also not released accordingly.

[9] On 12 October 2022, the first defendant had alleged that it had overpaid the plaintiff by a sum of RM29.56m and as such the said settlement agreement was no longer applicable. Pursuant to that allegation, the plaintiff issued a letter of demand through its solicitors to the first and third defendants for the outstanding sums and the agreed interest to be paid to it accordingly.

[10] Failure to receive any payment from the first, second and third defendant, the plaintiff had filed this action against all three defendants as per the prayer stated in its statement of claim filed in this action.

ENCLOSURE 4 — INTERLOCUTORY APPLICATION FOR INTERIM INJUNCTION

The plaintiffs position

[11] The plaintiff filed this application seeking for the following orders:

(i) an interim injunction to restrain the first defendant whether by themselves, or their directors, managers, officers, employees, servants, agents or otherwise howsoever from receiving the 96% of the certified payment under the IPC No 64 onwards and the full retention sum or any part thereof from the second defendant for the said project pending the disposal of the plaintiff's claim against the defendants in this suit;

(ii) alternatively, in the event the first defendant had received the payment for IPC No 64 onwards and/or the full retention sum or part thereof under the project from the second defendant before the disposal of this suit, an order that the monies received to be deposited into an interest-bearing stakeholder's account until the disposal of this suit;

(iii) an interim injunction to restrain the second defendant whether by themselves, or their directors, managers, officers, employees, servants, agents or otherwise howsoever from making the 96% of the certified payment under the IPC No 64 onwards and the full retention sum or any part thereof to the second defendant for the said project pending the disposal of the plaintiffs claim against the defendants in this suit;

(iv) the cost of this application paid by the first and second defendant to the plaintiff; and

(v) such further and other orders as deemed fit and fair.

[12] The reason for this application is entirely based on the background of this case as stated in the plaintiff's statement of claim and as reiterated in the paragraphs hereinabove.

[13] Based on the given background facts, the plaintiff contents that it has a serious bona fide claim against the defendants and that in the event an interim injunction is not granted, it will suffer irreparable damages as the monies held by the second defendant will be released to the first defendant and as such it will alter the position of the parties before the disposal of this suit.

[14] If the monies had been released to the first defendant then an order to place the monies into an interest-bearing stakeholder account will prevent the usage of the same until the disposal of this suit, as such, preserving the status quo of the parties.

[15] On a balance of convenience, the plaintiff contends that it will suffer more if the interim injunction is not granted as oppose to the defendants if the interim injunction is granted. This is because if the payment from IPC No 64 onwards and the full retention sum are released to the first defendant, the plaintiff will be deprived of the fruits of its labour as oppose to the first and second defendants who will be benefitting from the work done by the plaintiff.

[16] The plaintiff undertakes to pay damages to the defendants should this interim injunction be granted and if the plaintiff fails in obtaining a decision in favour of itself in the determination of the suit filed in this court.

The first and second defendants' position

[17] The first defendant's objection to this application is on the grounds that the plaintiff has been overpaid by RM29.56m and as such the said settlement agreement is no longer applicable.

[18] It is also the first defendant's contention that the plaintiff had not carried out its obligations, responsibilities to execute and complete the subcontract works in accordance to cl 3 of the subcontract. As a result of the plaintiff's failure to progress the works regularly and diligently, the first defendant is exposed to the counterclaim made by the second defendant against it. As such, the plaintiff has not come with clean hands in filing this suit and this application.

[19] The second defendant contends that it has no part in the said settlement agreement entered by the plaintiff and the first defendant. The party which has privity of contract with the second defendant is the first defendant. As such, any uncompleted works or defects are to be completed or rectified respectively by the first defendant.

[20] Should the second defendant incur additional cost to complete or in making good the defects, the payment in IPC No 64 onwards and the full retention sum are sums which the second defendant to be used to set off the incurred expenses. Therefore, if the interim injunction is granted, it will prejudice the second defendant greatly.

[21] The plaintiff can be adequately remedied with damages if it is not being granted with the interim injunction sought through this application as the relieve claimed by the plaintiff is only monetary.

A THE LAW

[22] As to what constitutes 'interlocutory' the case of *Lian Keow Sdn Bhd & Anor v Overseas Credit Finance (M) Bhd & Ors* [1982] 2 MLJ 162; [1982] CLJ Rep 182, Salleh Abas FCJ (as he then was) had explained:

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> An interlocutory injunction is a temporary and discretionary remedy. To consider whether to grant it or to refuse it, the court is not concerned with the chances of success or failure of the appellants in proving their civil suit at the forthcoming trial, neither is the court's function to evaluate the evidence and material before it for that purpose. *The court is simply concerned with what it has to do in the meantime in order to protect the right of the parties so that no irreparable injury would be caused to either of them. Further, whilst the court is not concerned with such questions the court must however, be satisfied that there are serious question to be gone into in that suit, lest an application for injunction should be made on frivolous and vexatious grounds ...* (Emphasis added.)

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[23] The principles as to whether an interim injunction sought through an interlocutory application can be granted or not are set out in the case of *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 which was adopted in the case of *Keet Gerald Francis Noel John v Mohd Noor Bin Abdullah & Ors* [1995] 1 MLJ 193 ('the *Keet Gerald*'s case') where the Court of Appeal reinforced the factors which have to be considered in such an application. Gopal Sri Ram JCA (as he then was) in the *Keet Gerald*'s case had instructively provided guidelines to the courts in considering an interlocutory application (in the case of *Jaya Sudhir a/l Jayaram v Nautical Supreme Sdn Bhd & Ors* [2019] 5 MLJ 1; [2019] 7 CLJ 395 (FC), the Federal Court reaffirmed that the applicable test for the grant of interim injunction is the ('*Keet Gerald Francis* test'):

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(a) whether there is a bona fide serious issue to be tried;

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(b) where the justice of the case lies; and

(c) when damages are not an adequate remedy.

FINDINGS OF THE COURT

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[24] Whether there is a bona fide serious issue to be tried goes back to the reason as to why this application was made by the plaintiff. In this case, it has been shown to this court that the plaintiff's claims are based on the alleged breach of the said settlement agreement and the non-payment for the works done based on the subcontract.

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[25] Though it is the first defendant's rebuttal that the plaintiff did not come with clean hands as it had failed to carry out its obligations, responsibilities under the subcontract and that the first defendant had overpaid the plaintiff for

the works done and as such the said settlement agreement is no longer applicable, all these allegations are by way of a sworn affidavit only. A

[26] As this is an interlocutory application for an interim injunction, the merits of the case in its entirety cannot be deliberated just merely by way of affidavits filed by the parties. There being so many questions arising from these affidavits where answers need to be given, the deponents of these affidavits have to be subjected to cross-examination. Further evidences also have to be adduced in court in order to substantiate the allegations made by all parties. Therefore, I have no doubt that the plaintiff has a bona fide serious issue to be tried in this case. B C

[27] On the issue of where does the justice lies in this case should the interim injunction be granted, it is the plaintiff's contention that this interim injunction is sought so as to maintain status quo pending the disposal of the action filed in this court. Therefore, it is to secure the relief sought by the plaintiff through this action should it be successful. Whether by granting the interim injunction to the plaintiff would cause the defendants to suffer greater injustice as compared to the injustice suffered by the plaintiff if the same was not granted? D E

[28] Here, the relief sought is purely monetary and therefore, I could not agree to the plaintiff's claim that if the interim injunction is not granted it will suffer irreparable damages. On the contrary, should this application be allowed, I found that the defendants will suffer greater injustice. This is because, allegedly there are still works at the project which were failed to be completed by the first defendant or its appointed subcontractor (the plaintiff) and under the main contract, the second defendant has contractual rights which it can exercise including but not limited to deducting from any moneys due or to become due all costs, expenses and losses in completing or rectifying the works. F G

[29] Hence, I found that the justice in this case was tilting towards not granting the interim injunction. The point that tipped the scale totally in not granting the interim injunction was the fact that the plaintiff can be adequately remedied with damages as the relief sought by the plaintiff is entirely monetary. H

[30] As to the plaintiff's undertaking to pay damages to the defendants should this application fail, this is no longer a factor for my consideration as I have already decided not to allow this application for other obvious reasons. Be that as it may, it has been highlighted to the court that although the undertaking was given, the plaintiff failed to provide any evidence to this court in relation to its financial capabilities to support such an undertaking. I

[31] In the upshot, I dismissed the plaintiff's application for an interim injunction in encl 4 with costs of RM5,000 to the first defendant, RM3,000 to the second defendant and RM1,000 to the third defendant (for having to be present for each and every case management in relation to encl 4) all of which are subject to allocator.

Enclosure 4 dismissed with costs of RM5,000 to first defendant, RM3,000 to second defendant, and RM1,000 to third defendant subject to allocator.

Reported by Dzulqarnain Ab Fatar